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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 161

CONNECTICUT COMMITTEE AGAINST PAY TV, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1–7) is reported at 301 F. 2d 835. The First and Third Reports on Subscription Television of the Federal Communications Commission, prescribing the conditions under which the Commission would authorize a trial of subscription television operations, are reported at 23 F.C.C. 521 and 26 F.C.C. 265. The Commission's Second Report on Subscription Television has not been officially reported, but is reported unofficially at 16 Pike & Fischer, Radio Regu-

lation 1539. The Commission's Report and Decision granting the application of Hartford Phonevision Co. (now RKO General Phonevision Co.) for authority to conduct a trial subscription television operation is reported at 30 F.C.C. 301.

JURISDICTION

The judgment of the court of appeals affirming the decision of the Commission was entered on March 8, 1962 (Pet. App. 8). The petition for a writ of certiorari was filed on June 6, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 47 U.S.C. 402(j).

QUESTION PRESENTED

Whether the Federal Communications Commission is empowered to license on a trial basis a subscription television service which requires the payment of a fee by the public to receive programs.

STATUTE INVOLVED

The pertinent provisions of the Communications Act of 1934, 48 Stat. 1064, as amended, 47 U.S.C. 151 *et seq.*, are set forth at pages 2–6 of the petition.

STATEMENT

In 1955 the Commission instituted a rule making proceeding to determine whether television broadcast stations should be authorized to transmit programs whose reception by the public in intelligible form would require the payment of a charge (Notice of Proposed Rule Making in Docket No. 11279, 20 F.R. 988). In the Notice of Rule Making the Commission requested comments on the questions whether it had

statutory power to authorize subscription television operations and, if so, whether such operations would be in the public interest (20 F.R. at 989). By a Notice of Further Proceedings of May 23, 1957, the Commission requested further comments on the conditions under which it might be desirable to authorize subscription television on a trial basis (22 F.R. 3758).

Thereafter, in its First Report on Subscription Television (23 F.C.C. 531), issued October 17, 1957, the Commission determined, after a review of the pertinent statutory provisions and their legislative history, that it had statutory authority to authorize subscription television (*id.* at 535–540). It stated, however, that in the absence of a demonstration of the service in operation, it could not determine whether authorization of a subscription system on a permanent basis would be in the public interest (*id.* at 542–543). It concluded that a trial of subscription television under conditions established in advance by the Commission would serve the public interest by enabling the public to register its judgment and by providing operational data on competitive impact, technical standards and the possible need for new legislation to support additional administrative supervision (*id.* at 555–556). The Commission then prescribed the conditions under which applications for trial subscription television operations would be considered (*id.* at 546–555).

On February 26, 1958, the Commission issued a Second Report on Subscription Television, 16 Pike & Fischer, Radio Regulation 1539, announcing that it would not process applications for trial authoriza-

tion until 30 days after the adjournment of the 85th Congress. This Report followed the introduction in Congress of a number of bills which would have either prohibited subscription television or restricted the Commission's authority to authorize it,[1] as well as adoption of resolutions by the House and Senate Interstate Commerce Committees proposing that the Commission withhold action until specifically authorized by Congress (*id.* at 1539–1540).

When none of these pending bills were acted upon by Congress, the Commission on March 23, 1959, adopted a Third Report in Docket No. 11279, 26 F.C.C. 265, in which it decided to process applications filed in conformity with revised requirements set forth therein. These requirements provided, *inter alia,* that trials would be authorized only in cities with four or more commercial television services; that trial authorizations would be limited to a three-year period, not renewable as of right; and that the licensee would be required to retain control of programs and subscription rates and to furnish periodic and other special reports to the Commission concerning all aspects of the subscription television operation, including the fixing and collection of fees (26 F.C.C. 267–272). In order to insure against a premature establishment of subscription service, the Commission added further requirements (1) limiting the trial of any one system to one city and permitting only one trial operation in any particular community, and (2)

[1] See, *e.g.*, H.R. 586, 85th Cong., 1st Sess.; S. 3201, 85th Cong., 2d Sess.; H.R. 9629, 85th Cong., 2d Sess.; S. 2934, 85th Cong., 2d Sess.

prohibiting the sale to the public of the special receiving devices required for subscription television (*id.* at 266).

At the same time the Commission reaffirmed (26 F.C.C. 266) its intention, announced in the First Report, to hold full public hearings before reaching a decision on the permanent authorization of subscription television (23 F.C.C. 556):

> The Commission will, when it finds that sufficient, meaningful data are available from trial subscription television operations, conduct a public hearing at which all interested parties will have full opportunity to submit information, data and views concerning the foregoing [specified public interest questions] and any other questions which remain to be answered in reaching a decision as to whether the authorization of a subscription television service on some extended or continuing basis would serve the public interest.

On March 26, 1959, the House Interstate Commerce Committee adopted a resolution stating that it had no objection to the authorization of trial subscription television operations as contemplated in the Third Report (105 Cong. Rec. 5362–5363).

On June 22, 1960, Hartford Phonevision Company (RKO) [2] filed an application for authority to conduct trial subscription television operation over its television station WHCT in Hartford, Connecticut, dur-

[2] The name of the applicant was subsequently changed to RKO Phonevision Company, and is now RKO General Phonevision Company. See motion of RKO General Phonevision Company for leave to be named a party-respondent in this Court.

ing 40 hours of the station's 70-hour broadcast week (J.A. 5).[3] The so-called "Phonevision" system proposed by RKO involves the use of an encoder which "scrambles" (renders unintelligible) the video and audio signals of a standard television transmitter and a decoder, placed on the receiver of a subscriber, which restores intelligibility (30 F.C.C. 302–303). The subscriber will be required to pay an installation charge estimated at between $7.50 and $10; a rental charge, not to exceed 75 cents a week, to cover repairs and maintenance service; and a per program charge of from 25 cents to $3.50, with most programs expected to fall within the price range of 75 cents to $1.50 (*id.* at 304). The operation is to be financed solely by these charges; there is to be no commercial advertising (*id.* at 308). RKO's programming plans consist mainly of "box-office attractions" (i.e., programming for which the public would ordinarily pay an admission charge), including first-run motion pictures, legitimate theatre, opera, ballet, concerts, educational features, art and children's films and sports features (*id.* at 307–308).

Following a public hearing before the Commission *en banc*, in which petitioners participated as parties in interest, the Commission, in a Report and Decision issued February 23, 1961, found that a grant of the RKO application for a trial subscription television operation would be in the public interest (*id.* at 301, 321). The Commission concluded that the proposed

[3] The citation is to the joint appendix filed by the parties in the court of appeals which is presently on file with the Clerk of this Court.

trial would fulfill the objectives of the First and Third Reports on Subscription Television and provide useful information which would assist the Commission in its ultimate determination whether some form of subscription television service on a permanent basis would be in the public interest (*id.* at 310, 321).

In reaching this conclusion, the Commission determined that the arrangements proposed by RKO adequately protected subscribers against the purchase of equipment which might later become worthless (*id.* at 311);[4] that the station licensee would retain adequate control over programs and maximum charges (*id.* at 312–313); that, while some conventional programming in Hartford would be displaced and some program sources diverted to subscription television, the effects would not be substantial, and could, in any event, only be determined by the trial itself (*id.* at 313–315); and that severe adverse effects on the other television stations in the Hartford area could not be expected (*id.* at 315–316). The Commission granted the requested authorization for a period of three years, subject to the conditions of the Third Report and to the further express conditions that the authorization was not renewable as of right and could be revoked

[4] The Commission rejected a contention that installation and rental charges on the decoders should not be permitted, stating (30 F.C.C. 311): "it would appear that such proscription could rob the trial of at least some of its value, for if the decoders were literally given away, we would receive no indication of the public's true capacity and desire to pay some amount toward amortization or depreciation of decoders." The Commission also rejected, as without record support, a claim that the proposed charges were unreasonable (30 F.C.C. 311, fn. 6).

or modified at any time upon notice and hearing (*id.* at 321–322).

The court of appeals affirmed the Commission's decision on March 8, 1962 (Pet. App. 1–7). It did not accept the contention of petitioners that the Commission lacks statutory power to authorize a system which requires the direct payment of fees from the public. The court found that the Commission was given a "broad grant of power" by Congress, subject to limitations not pertinent here, to issue a license to any applicant if the public interest would be served (47 U.S.C. 307(a)), and that Congress had specifically commanded the Commission in Section 303(g) of the Communications Act to "study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" (Pet. App. 5–6). The court held that the plain language of the statute "thus makes clear that Congress placed an affirmative duty on the Commission to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities" (Pet. App. 6).

Finding that the distinguishing characteristic of the authorization in this case was its trial nature, the court of appeals also rejected the contention that the predicted dangers of a trial of subscription television rendered such a trial contrary to the public interest (Pet. App. 6–7). It noted that every license for future operation necessarily involves some predictions as to an uncertain future, and found reasonable the Commission's determination that "the public benefits anticipated by the Commission warrant the risks of

the experiment" (Pet. App. 6). The court also pointed out, in this connection, the power retained by the Commission to terminate the trial upon notice and hearing at any time prior to the expiration of the 3-year period, and the Commission's expressed determination to oversee carefully the conduct of the trial.

ARGUMENT

1. The only issue properly before the Court is whether the Federal Communications Commission is empowered to authorize on a trial basis a subscription television system which requires the payment of direct fees by the public.[5] The decision below, upholding this power, was correct and no further review by this Court is warranted.

Petitioners contend (Pet. 17–20) that, because of the novel nature of subscription television, the Commission is without power to license it, in the absence of a specific affirmative grant of such power in the Communications Act. This contention rests on a misreading of the Act which, as found by the court

[5] "The dangers inherent in a pay-TV operation" set forth at pages 15–17 of the petition represent petitioners' predictions of the effects of permanent authorization of subscription television and do not provide a reason for the grant of certiorari in this case. It is for the precise purpose of providing operational data which will enable the Commission to evaluate the impact and benefits of subscription television before deciding whether to authorize it on an extended basis, that this trial was authorized. A determination of the public interest objections to permanent operation asserted here by petitioners will be made at a further hearing to be held by the Commission at the conclusion of the trial operation (23 F.C.C. 556).

of appeals, confers a "broad grant of power" upon the Commission (Pet. App. 5). Thus, Section 307(a) authorizes the Commission, subject to limitations not pertinent here, to grant a station license to any applicant "if public convenience, interest, or necessity will be served" (47 U.S.C. 307(a); Pet. 6). Sections 303(a) and (b), 47 U.S.C. 303 (a), (b) (Pet. 4), empower the Commission to classify stations and to prescribe the nature of the service rendered by each class of station and each station within any class. Congress, in Section 303(g), also directed the Commission, "Except as otherwise provided in this Act," to "Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest" (47 U.S.C. 303(g); Pet. 5). Since there is no provision in the Communications Act either prohibiting a service requiring the direct payment of a fee by the public or limiting the use of radio frequencies to those services which were common when the law was enacted, these provisions, without more, afford ample basis for the Commission's action and a full answer to petitioner's attack upon it.

The Communications Act does not itemize the types of radio service which the Commission is authorized to license and neither the statute nor the cases interpreting it provide a ground for petitioners' assertion that such specific authorization should be required in the case of subscription television.[6] For,

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[6] The authorization of a subscription service is not without precedent. See *In the Matter of Muzak Corporation*, 8 F.C.C.

as this Court has declared, "Congress was acting in a field of regulation which was both new and dynamic." Its "dominant characteristic . . . was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219. Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." Instead, it defined broad areas for regulation under governing standards (*id.* at 219–220) and, recognizing that the Commission's "authority covers new and rapidly developing fields" (*United States* v. *Storer Broadcasting Co.*, 351 U.S. 192, 203), affirmatively directed the Commission to encourage new uses for radio (47 U.S.C. 303(g)),[7] and clothed it with wide discretion in choosing among the competing demands for frequencies.

As the court of appeals held upon a careful examination of petitioners' contention, the plain language of the statute places upon the Commission "an af-

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581; *Functional Music, Inc.* v. *Federal Communications Commission*, 274 F. 2d 543 (C.A.D.C.), certiorari denied, 361 U.S. 813.

[7] Petitioners' reliance (Pet. 20) upon *Interstate Commerce Comission* v. *United States ex rel. Los Angeles*, 280 U.S. 52, is misplaced. In that case, the statute authorized the Interstate Commerce Commission to require a carrier to permit another carrier to use its terminal facilities. This Court refused to extend that power to permit the Commission to compel carriers "to build a union passenger station in a city of the size and extent and the great business requirements of Los Angeles" (280 U.S. at 68).

firmative duty . . . to experiment with and develop the most desirable deployment and utilization of the nation's communications facilities" (Pet. App. 6). The license challenged here, falls squarely within the scope of that duty.[8]

2. Petitioners' contention (Pet. 22–25) that the Commission erred in authorizing a trial subscription television operation without first determining whether it can or should regulate rates, is raised for the first time in the petition and is therefore not properly before the Court. This allegation of error was not included in the notice of appeal or in the stipulated issues filed with the court of appeals (J.A. 1–4). Contrary to petitioners' present contention (Pet. 25, fn. 27), it was not presented to the court of appeals in the briefs below.[9]

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[8] Petitioners also urge (Pet. 20–21, 22) that, while the Commission found it had statutory power to authorize subscription television on a regular, permanent basis, the court of appeals did not reach this question and found such authority only to authorize a trial test. We do not believe this to be a correct evaluation of the opinion below, so far as the issue of basic authority raised by petitioners is concerned. Statutory support for the Commission's jurisdiction to authorize a system requiring the payment of fees by the public is equally necessary whether that authorization be for a trial or a permanent operation. Neither the Commission nor the court below (nor, indeed, petitioners) made the alleged distinction. As petitioners recognize (Pet. 21, fn. 23), the court below correctly stated petitioners' contention as a broad attack on the Commission's statutory power to authorize any system requiring the direct payment of fees from the public.

[9] In their briefs before the court of appeals (copies of which are being lodged with this Court), petitioners assumed that the Commission had no power to regulate rates in arguing that it had no power to authorize subscription operations, but did not

In any event, the contention is without merit. This is a trial authorization. The information obtained will assist the Commission in determining whether rates should be regulated, and, if so, what kind of regulation would be required and whether additional legislation might be desirable (see First Report, 23 F.C.C. 531, 533). Petitioners' assertion, made for the first time here, that the Commission was required to answer these questions in advance of the trial authorization would put the cart before the horse. Moreover, the absence of such a determination in no way threatens the public interest. Should the rates charged for the trial service prove objectionable at any time, the Commission, which has required the licensee to retain control over maximum charges (30 F.C.C. 311–312) and has itself retained the power to revoke or modify the authorization upon notice and hearing (*id.* at 321–322), is amply prepared to act.

The short answer to petitioners' contention that the Commission erred in failing to determine its power to regulate the rates charged when and if permanent operations are authorized, is that the trial authorization being contested in this case nowhere presents that question. It will be time enough to consider this issue when the information to be obtained by the trial operation is available and when the question whether to authorize a permanent operation is before the Commission.

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urge that the Commission had erred by failing to consider whether it could or should regulate rates (Brief for Appellants, pp. 20–21, 22–23; Reply Brief for Appellants, pp. 2–6).

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted.

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JULY 1962.